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No. 85-5542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually, and as next friend on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR PETITIONER

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7 DAYS

QUESTIONS PRESENTED

1. Whether the Eighth Amendment forbids the execution of a condemned person who is incompetent at the time of execution?

2. Whether Florida's state-law prohibition against executing the incompetent has created an entitlement to be spared from execution when incompetent, that, under the Fourteenth Amendment, cannot be withdrawn without a full and fair adversarial hearing?

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CITATION TO OPINIONS BELOW

The order of the District Court denying habeas corpus relief is unreported. JA 158. The opinion of the Court of Appeals granting a stay of execution is reported as *Ford* v. *Strickland*, 734 F.2d 538 (11th Cir. 1984). JA 166. The opinion of the Court of Appeals on the merits is reported as *Ford* v. *Wainwright*, 752 F.2d 526 (11th Cir. 1985), and is set out at JA 183. The summary order denying rehearing is reported at 765 F.2d 154, and is set out at JA 202.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 17, 1985, and petitioner's timely petition for rehearing was denied on June 3, 1985. Thereafter, this Court entered an order extending the time within which the petition for writ of certiorari could be filed to and including October 1, 1985. The petition was filed on October 1, 1985 and certiorari was granted on December 9, 1985. JA 207. Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, the text of which is set out in Appendix A hereto. It also involves Section 922.07, *Florida Statutes* (1983), which is also set forth in Appendix A.

STATEMENT OF THE CASE

Alvin Bernard Ford was convicted and sentenced to death by the State of Florida. The validity of his conviction and death sentence has previously been litigated, *see Ford* v. *Strickland*, 696 F.2d 804 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983), and is not at issue in these proceedings. The present proceeding is concerned solely with the constitutionality of Florida's effort to execute Mr. Ford despite substantial evidence of his current incompetency.

In early 1982, during the pendency of Mr. Ford's appeal from the denial of his first habeas corpus petition, gradual changes began to appear in Mr. Ford's behavior. JA 17-34 (habeas corpus allegations). The changes had begun only as occasional peculiar ideas and misperceptions. However, as they became more frequent and noticeable, counsel for Mr. Ford asked a psychiatrist, Dr. Jamal Amin, to continue seeing Mr. Ford and to recommend any treatment he deemed appropriate.[1] By June, 1983, Dr. Amin concluded that Mr. Ford was suffering from paranoid schizophrenia and recommended that he be treated with psychotropic medication. JA 88-92.[2] No treatment was provided by respondent, however. Mr. Ford continued to deteriorate thereafter, until reaching a point where counsel believed him to be incompetent, no longer able to communicate.

As a result, on October 20, 1983, counsel for Mr. Ford invoked the procedures of *Fla. Stat.* § 922.07 (1983), relating to the competency of a condemned inmate. Pursuant to this statute, the Florida governor appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity. The commission members each reported their conflicting findings separately to the Governor in writing. The governor's decision was not announced until April 30, 1984, when, without further proceedings and without any explicit resolution of these conflicts, he signed a death warrant ordering Mr. Ford's execution. JA 12.

On May 21, 1984, Mr. Ford's attorneys filed in the state trial court a "Motion for a Hearing and Appointment of Experts for

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[1] Dr. Amin had first evaluated Mr. Ford in July, 1981, in connection with Florida's clemency procedure. JA 87.

[2] This was to be Dr. Amin's last direct contact with Mr. Ford, since Mr. Ford came to view him as a part of a "conspiracy" against him and refused to see him. JA 63 (habeas corpus allegations). Thus, Dr. Amin was unable to assess Mr. Ford's competency after June, 1983. Counsel, believing that a psychiatrist other than Dr. Amin was therefore necessary, asked Dr. Harold Kaufman to review Mr. Ford's condition. JA 63. Prior to evaluating Mr. Ford, Dr. Kaufman reviewed Mr. Ford's correspondence, audio tapes of interviews conducted by counsel, prior evaluations and case records. JA 63-64.

Determination of Competency to be Executed, and for a Stay of Execution During the Pendency Thereof," together with a supporting memorandum of law and an extensive appendix containing documentation of Mr. Ford's incompetency. R 1219-82. The trial court denied the motion without a hearing and without findings. JA 4. On appeal, the Florida Supreme Court also denied relief. It held that the governor, pursuant to *Fla. Stat.* §922.07, provides the only remedy for the condemned in Florida who are incompetent at the time of execution and that the courts have no power to review the governor's determination of competency to be executed. *Ford* v. *State*, 451 So.2d 471, 475 (Fla. 1984); JA 9-10.

Thereafter, counsel for Mr. Ford filed a habeas corpus petition in the United States District Court for the Southern District of Florida, claiming *inter alia* that the Constitution prohibited his execution if presently incompetent and accordingly, entitled him to an evidentiary hearing to determine his competency.

In support of this request, counsel proffered extensive documentation of Mr. Ford's mental illness, consisting of Mr. Ford's correspondence during the course of his illness, a report concerning the psychiatric interviews and evaluations by Dr. Amin, and transcripts of interviews between Mr. Ford and his counsel. JA 17-77 (habeas corpus allegations); R 183-489 (documentation filed as appendix to petition for writ of habeas corpus).[3] It showed a progressive deterioration of Mr. Ford's mental and emotional health from December, 1981, forward. It further showed that by June, 1983, Dr. Amin had concluded that Mr. Ford was suffering from paranoid schizophrenia. JA 91.

Counsel's proffer also included psychiatric opinions respecting Mr. Ford's competency. Four psychiatrists had been asked to evaluate Mr. Ford's competency in November and December of 1983—one (Dr. Kaufman) at the request of counsel for Mr.

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[3] The documentation filed in the District Court was the same as had been submitted to the state courts.

Ford, JA 93-97, and three (Dr. Mhatre, Dr. Afield, and Dr. Ivory) by appointment of the Florida governor pursuant to *Fla. Stat.* § 922.07. JA 98-106. Two others recognized for their expertise in forensic psychiatry, Dr. Halleck and Dr. Barnard, were asked to review only the process by which the psychiatrists appointed by the governor had evaluated Mr. Ford. JA 109-24. The opinions of the four evaluating psychiatrists were nearly unanimous that Mr. Ford was psychotic but were sharply divergent concerning his competency to be executed in light of his psychosis.

Dr. Kaufman and two of the governor's psychiatrists, Dr. Mhatre and Dr. Afield, confirmed Dr. Amin's previous diagnosis that Mr. Ford was suffering from paranoid schizophrenia or an equally profound form of psychosis. JA 96, 103-104, 105.[4] Only Dr. Ivory disagreed, finding a "severe adaptational disorder" but not psychosis. JA 99. However, Dr. Halleck explained

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[4] A typical example of Mr. Ford's mental state, demonstrating many of the hallmarks of psychosis, *see* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 188-90 (3d ed. 1980), was recorded by Dr. Kaufman during his interview with Mr. Ford on November 3, 1983:

> The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch . . . there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me—Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me . . . I never see them, I only hear them especially at night. (Note that Mr. Ford denies *seeing* these people in his delusions. This suggests that he is honestly reporting what his mental processes are.) I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley) . . . you can't evaluate me. I did a study in the army . . . a lot of masturbation . . . I lost a lot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to—Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other counties and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

JA 94-95 (comments in parentheses are those of Dr. Kaufman).

that Dr. Ivory's finding was unreliable because of his apparent failure to consider data crucial to an accurate diagnosis: "the history and previous evaluation of Mr. Ford's condition." JA 113. Dr. Barnard agreed with Dr. Halleck and further concluded that Dr. Ivory's crucial inferential finding, that Mr. Ford was feigning psychosis because his cell was far better organized than his thought processes seemed to be, JA 100, had no basis in the medical literature. JA 120-21.

Despite agreement that Mr. Ford was deeply psychotic, Dr. Kaufman, Dr. Mhatre, and Dr. Afield disagreed concerning his competency to be executed. Dr. Kaufman concluded that Mr. Ford was incompetent and fully documented the facts, as well as the reasoning, that led to this conclusion. JA 93-97.[5] Although Dr. Mhatre and Dr. Afield concluded that Mr. Ford was then competent[6] under the statutory standard, JA 103, 105-06,[7] neither explained that conclusion in light of his agree-

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[5] Dr. Kaufman noted and explained his conclusion as follows:

> It is my conclusion, using the Florida statutory standard you have supplied me with, that because of his psychiatric illness, while he does understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the governor and control him, President Reagan's interference in the execution process, etc.

JA 96.

[6] Dr. Mhatre, though opining that Mr. Ford was competent in December, 1983, predicted that without antipsychotic treatment, Mr. Ford "is likely to deteriorate and may soon reach a point where he may not be competent for execution." JA 103-04. This prediction of deterioration was confirmed by the supplementary examination by Dr. Kaufman conducted on May 23, 1984 at the request of Mr. Ford's counsel. Dr. Kaufman found that his condition had "seriously deteriorated since November 3, 1983 . . . so that he now has at best only minimal contact with the external world." JA 108. He again concluded that Mr. Ford was incompetent under the Florida statutory standard. JA 108.

[7] Florida's standard of competency at execution is whether the condemned prisoner "understands the nature and effect of the death penalty and why it is to be imposed upon him." *Fla. Stat.* § 922.07(1).

ment with Dr. Kaufman's clinical findings that Mr. Ford was *psychotic*. On the basis of the clinical features of Mr. Ford's psychosis, Dr. Kaufman had concluded that Mr. Ford was incompetent because "his ability to reason [was] occluded, disorganized and confused when thinking about his possible execution"; he was unable to make a connection between the homicide he committed and the death penalty; and, because of his bizarre thought processes, he sincerely believed that he was not going to be executed. JA 96 (opinion of Dr. Kaufman). Yet, Dr. Mhatre and Dr. Afield made no effort to explain how they could agree with Dr. Kaufman's clinical findings and still conclude that Mr. Ford was competent. JA 103, 105-06.[8] In the opinions of Dr. Halleck and Dr. Barnard, Dr. Mhatre's and Dr. Afield's conclusions as to Mr. Ford's competency were unreliable, because the process by which they reasoned from clinical data to psychiatric/legal conclusion was unexplained and apparently unsupportable. JA 112-14, 121-22.

Notwithstanding this proffer, on May 29, 1984, the district court denied the petition without a hearing. It ruled on alternative grounds that Mr. Ford had abused the writ or that Florida's compliance with § 922.07 adequately protected Mr. Ford's constitutional right, if any, to be spared from execution when incompetent. JA 164.

On May 30, 1984, the court of appeals granted a certificate of probable cause and stayed Mr. Ford's execution. *Ford* v. *Strickland*, 734 F.2d 538 (11th Cir. 1984); JA 166. This Court thereafter denied respondent's motion to vacate the stay. *Wainwright* v. *Ford*, ___ U.S. ___, 104 S.Ct. 3498 (1984); JA 180. A divided panel of the court of appeals then affirmed the denial of Mr. Ford's claim on the merits. *Ford* v. *Wainwright*, 752 F.2d 526 (11th Cir. 1985); JA 183. Rehearing and rehearing en banc were denied. JA 202.

SUMMARY OF ARGUMENT

1. No court has yet decided whether the Eighth Amendment prohibits execution of the presently incompetent. The

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[8] Dr. Ivory also concluded, consistent with his clinical impression that Mr. Ford was not psychotic, that Mr. Ford was competent. JA 100.

question is now before this Court. Under either of the Eighth Amendment analyses utilized by the Court, execution of the presently incompetent is forbidden. Competency to be executed is, accordingly, a matter to be determined in federal habeas corpus proceedings.

Even if the Framers of the Eighth Amendment intended to prohibit only those punishments that were considered cruel and unusual by the common law at the time it was adopted, *Solem* v. *Helm*, 463 U.S. 277, 285-86 (1983), execution of the incompetent was prohibited by the Eighth Amendment. From the thirteenth century on, the common law strictly prohibited execution of the incompetent as "savage" and as an act of "extreme inhumanity and cruelty." E. Coke, *Third Institute* 6 (1644). This aspect of the common law prohibition of cruel and unusual punishment was quite clearly carried forward in the founding of our Nation. 1 J. Chitty, *A Practical Treatise on the Criminal Law* 620 (Amer. ed. 1819).

If the scope of the Eighth Amendment's prohibition was intended to evolve along with the concept of human dignity, *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958); *Gregg* v. *Georgia*, 428 U.S. 153, 171-73 (1976), the Amendment likewise prohibits execution of the incompetent, for such executions are not in accord with contemporary views of "'the dignity of man.'" *Id.* at 173. The objective indicia of human dignity, *Enmund* v. *Florida*, 458 U.S. 782, 788-89 (1982), uniformly proscribe execution of the incompetent. Independent judicial evaluation is in agreement with the objective indicia, for execution of the incompetent makes no measurable contribution to the penological justifications for the death penalty, inflicts excessive suffering, and interferes with the right of access to the courts.

Since the Eighth Amendment prohibits execution of the incompetent, Mr. Ford has a right to have his competency determined in a federal habeas corpus proceeding. Because the only state determination of his competency was nonjudicial and was accomplished without a hearing of any kind, he is entitled

to have that determination made on the basis of a hearing in federal court. *Townsend* v. *Sain*, 372 U.S. 293 (1363).

2. Apart from the Eighth Amendment prohibition against executing the incompetent, the Fourteenth Amendment requires a procedurally fair determination of competency under Florida's state-created right to be spared from execution when incompetent. The resolution of this question is not controlled by *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950). *Solesbee* was decided at a time when due process analysis still turned on the right-privilege distinction, when sentencing proceedings were beyond the reach of the Due Process Clause, and well before the Due Process Clause required enhanced due process protection in death penalty cases. Thus, *Solesbee* can no longer be relied upon to resolve either the applicability of the Due Process Clause, or the extent of due process required, in the determination of competency under a state-created right to be spared from execution if incompetent. Application of modern due process principles reveals that Mr. Ford has a state-created entitlement to be spared from execution when incompetent, which cannot be withdrawn without substantially greater procedural protections than are afforded by *Fla. Stat.* § 922.07.

ARGUMENT

I.

THE EIGHTH AMENDMENT PROHIBITS EXECUTION OF THE PRESENTLY INCOMPETENT

On five previous occasions, between 1897 and 1958, the Court has had before it various questions regarding the execution of a condemned prisoner who is incompetent at the time of execution. In each of those cases the Court considered the questions only as a matter of due process,[9] since the Eighth

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[9] *Nobles* v. *Georgia*, 168 U.S. 398 (1897) (no right to jury for determining competency to be executed); *Phyle* v. *Duffy*, 334 U.S. 431 (1948) (no need to decide due process question because state judicial remedy still available); *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950) (reaching due process question and holding that the Due Process Clause does not govern); *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 568-69 (1953) (no issue to decide since judicial determination of competency "provide[d] full protection against the execution of the insane"); *Caritativo* v. *California*, 357 U.S. 549 (1958) (one sentence opinion citing *Solesbee*, with four justices separately opining that the Due Process Clause prohibited execution of the presently incompetent).

Amendment had not yet been incorporated into the Due Process Clause. *See Robinson* v. *California*, 370 U.S. 660 (1962). Nevertheless, the court below held that one of those cases, *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950), also controlled Mr. Ford's claim that the Eighth Amendment prohibits execution of the presently incompetent. As Mr. Ford demonstrates herein, the Eighth Amendment does preclude the execution of the presently incompetent. As a result, he is entitled to an evidentiary hearing to show that he is presently incompetent. And because there has been no fair and reliable state determination of his competency, he is entitled to that hearing in the federal habeas court. *See Townsend* v. *Sain*, 372 U.S. 293 (1963); *Vasquez* v. *Hillery*, ___ U.S. ___, 106 S.Ct. 617, 621-22 (1986); *id.* at 625 (O'Connor, J., concurring).

A. The Court Below Erred In Holding That *Solesbee* Controlled The Resolution Of The Eighth Amendment Claim.

In plain terms, *Solesbee* decided only whether the Due Process Clause, as then interpreted, was offended by "the method applied by Georgia here to determine the sanity of an already convicted defendant. . . ." 339 U.S. at 11. It did not decide the substantive issue of whether the Constitution prohibited execution of the presently incompetent. When *Solesbee* was decided in 1950, the Eighth Amendment's prohibition against cruel and unusual punishment was not to be incorporated into the Due Process Clause for another twelve years. *Robinson* v. *California*, *supra*. Similarly, the procedural rights guaranteed by the Due Process Clause did not apply to sentencing proceedings. *See Williams* v. *New York*, 337 U.S. 241, 245-46 (1949). Accordingly, the *Solesbee* Court held that the Due Process Clause did not apply to the procedures by which sanity was determined *after* conviction and sentencing. 339 U.S. at 12.

That *Solesbee*, in 1950, did not decide the Eighth Amendment issue is even clearer in light of the direct evolution brought about by the incorporation of the Eighth Amendment into the Fourteenth Amendment. The Constitution for the first time began to limit the states' power to punish—both as to sentencing procedures and as to sentences themselves. As a

result, the Court expressly recognized that its earlier precedents upholding state capital procedures against due process challenges required reconsideration and often a contrary result when the same procedures were challenged under the Eighth Amendment's requirement that there be greater reliability and fairness in capital sentencing determinations. *See, e.g., Gardner* v. *Florida*, 430 U.S. 349, 355-58 (1977) (plurality opinion); *id.* at 363-64 (White, J., concurring); *Lockett* v. *Ohio*, 438 U.S. 586, 597-99 (1978) (plurality opinion of Burger, C.J.) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* [v. *California*, 402 U.S. 183 (1971)] became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman* [v. *Georgia*, 408 U.S. 238 (1972)]"). Thus, various procedures that otherwise comport with the Fourteenth Amendment have been held not to satisfy the Eighth Amendment. *See, e.g., Beck* v. *Alabama*, 447 U.S. 625 (1980) (failure to permit consideration of lesser offenses); *Gardner* v. *Florida*, *supra* (use of confidential information in sentencing).

For these reasons, until the court of appeals rendered its anomalous decision in Mr. Ford's case, every lower federal court confronted with the same issue had held, as the eleventh circuit itself had held in *Goode* v. *Wainwright*, that "[t]here has been no conclusive determination whether there is such a constitutional entitlement [not to be executed if incompetent] under federal law." 731 F.2d 1482, 1483 (11th Cir. 1984) (citing *Gray* v. *Lucas*, 710 F.2d 1048, 1053-54 (5th Cir. 1983)). *Accord Ford* v. *Strickland*, 734 F.2d at 539 (granting stay of execution); JA 167. Thus, when Justice Powell wrote for the plurality, in upholding Mr. Ford's stay, that "[t]his Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane," *Wainwright* v. *Ford*, 104 S.Ct. at 3498 n.*; JA 181, he was demonstrably correct.

The question is now before the Court. And as Mr. Ford demonstrates, under either of the Eighth Amendment analyses that have been utilized by the Court—the intent of the Framers or the evolving standards of decency—execution of the presently incompetent is forbidden.

B. The Intent of the Framers Was That The Presently Incompetent Be Spared From Execution

One of the two primary modes of analysis used for determining whether a particular punishment violates the Eighth Amendment is to determine the intent of the Framers of the Bill of Rights. That intent included the centuries-old prohibition on executing the incompetent.

It is now a settled principle of Eighth Amendment jurisprudence that, at the very least, the "cruel and unusual punishments" clause was adopted to protect American citizens from punishments which were considered unnecessarily cruel, torturous, or barbarous by English law at the time the Eighth Amendment was adopted. *Solem* v. *Helm*, 463 U.S. 277, 285-86 (1983); *id.* at 312-13 (Burger, C.J., joined by White, Rehnquist, and O'Connor, J.J., dissenting). Thus, Thomas Cooley, though finding it "certainly difficult to determine precisely what is meant by cruel and unusual punishments," believed that only punishments permitted under common law at the time of the adoption of the amendment would be permitted by the Eighth Amendment. T. Cooley, *A Treatise on the Constitutional Limitations* 472-73 (7th ed. 1903). Concurring in *Furman*, Justice Brennan summarized the Court's early Eighth Amendment decisions as "concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted." *Furman* v. *Georgia*, 408 U.S. at 264 (Brennan, J., concurring). *Accord McGautha* v. *California*, 402 U.S. at 226 (Black, J., concurring).[10] Accordingly, whether the Framers intended that the Eighth Amendment protect the incompetent from

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[10] The "intent of the Framers" in adopting the Eighth Amendment is not, therefore, the "elusive quarry" that it has been with respect to, for example, the Sixth Amendment. *Cf. Williams* v. *Florida*, 399 U.S. 78, 92-93, 99 (1970). In contrast, the Framers clearly intended to equate the constitutional prohibition against cruel and unusual punishments with the common law prohibition; even though they "may have intended the Eighth Amendment to go beyond the scope of its English counterpart," *Solem* v. *Helm*, 463 U.S. at 286, "their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection. . . ." *Id.*

execution depends in turn upon the view taken by the common law of the execution of the incompetent.[11]

At common law execution of the incompetent was prohibited as a "savage and inhuman" act, 4 W. Blackstone, *Commentaries on the Law of England* 24 (1768), and "a miserable spectacle . . . of extreme inhumanity and cruelty," E. Coke, *Third Institute* 6 (1644). When the Eighth Amendment was framed, this prohibition was considered an "ancient" rule, dating from at least the thirteenth or early fourteenth century. 2 J. Stephen, *A History of the Criminal Law of England* 151 (1883) (citing the written laws of Edward II (1307-26) and Edward III (1326-77)).[12]

Further, the rule was unequivocal and universal in its application. This is best demonstrated by the reaction of the commentators to Henry VIII's attempt in the sixteenth century to establish a narrow exception to the rule for one convicted of "high treason." *See* 1 W. Hawkins, *A Treatise on the Pleas of the Crown* 2 (1716); Blackstone, at 24. Even this limited attempt to circumvent the prohibition against executing the incompetent was short-lived, for it was repealed within a few years of its enactment. *Id.*[13] With one voice, the commen-

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[11] The Framers of the Bill of Rights were, of course, familiar with the common law for that was the only system they had known: "The common law was the mapped world; to depart therefrom was to venture into the unknown." R. Berger, *Death Penalties* 63 (1982).

[12] *See also* N. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* 159 (1969) (tracing the treatment of insanity prior to Edward II); Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1931-32) (citing Fitzherbert, *Natura Brevium* 202 (1534)); S. Glueck, *Mental Disorder and the Criminal Law* 124-25 (1925). *Accord* Royal Commission on Capital Punishment, *1949-1953 Report* 13 (1953).

[13] The treason exception was repealed during the reign of Mary. Mary was Mary I, whom history has labeled as "Bloody Mary." She ruled from 1553 to 1558 and during her reign she procured "ferocious new treason laws," G.R. Elton, *England Under the Tudors* 219 (1960), punishable by "such pains of death as befits treason, stat. I, c.6." Mary's repeal of the "cruel and inhuman law" of Henry VIII was thus not motivated by benevolence, but by the overwhelming commitment of the common law to the prohibition against executing the incompetent.

tators sharply rebuked this effort to create an exception to the rule that for centuries had been so well-settled. Coke spoke for all the commentators when he wrote that this "cruel and inhuman law . . . was against the common law," which considered the execution of a "mad man . . . a miserable spectacle, both against law and of extreme inhumanity and cruelty. . . ." Coke, at 6. *Accord* Blackstone, at 24; 1 M. Hale, *History of the Pleas of the Crown* 35 (1736); Hawkins, at 2.

The history of Henry VIII's attempt to establish an exception to this rule reveals one other aspect of the rule that is material to the inquiry herein. To use the terms of current jurisprudence, the common law prohibition against execution of the incompetent gave rise to an "entitlement" to a reprieve rather than to a "mere hope," *see Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7-11 (1979), to be spared from execution. Writing in the first half of the eighteenth century, Hale explained that there were three kinds of reprieves, or stays of judgment or execution. The first two were discretionary: *ex mandato regis* (at king's command) and *ex arbitrio judicis* (at the judge's discretion). The third, however, was mandatory: *ex necessitate legis* (out of the necessity of law). *See generally* Hale, at ch. 57. The stay due to incompetency fell into this third category. Otherwise Henry VIII would have had no need to enact a new law in order to establish his exception to the rule forbidding execution of the incompetent. *See* 1 N. Walker, *Crime and Insanity in England* 196 (1968) ("that Henry VIII found it necessary to legislate before he could [execute an incompetent person] is almost conclusive evidence that it was *ex necessitate legis* . . ."). *Accord* Blackstone, at 394-97 (stays due to incompetency were *ex necessitate legis*); Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U.L. Rev. 434, 441 (1964) ("in the case of a convicted prisoner becoming *non compos* after judgment the judge was bound *ex necessitate legis* to grant a reprieve").

Although the rule prohibiting the execution of the presently incompetent was firmly entrenched, universally applied, and

indeed mandatory in the common law, the commentators emphasized different reasons for the rule. No less than five rationales were advanced. Coke explained it on grounds of fundamental humanity and decency: "[W]hen a mad man is executed, . . . [it is] a miserable spectacle, both against law and of extreme inhumanity and cruelty. . . ." Coke, at 6. *Accord* Blackstone, at 24; Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 State Trials 474, 477 (Howell ed. 1816), (*republished from*, 3 State-Tryals 651 (1719). Hale explained that execution of the incompetent was unfair because of the inability of such persons to defend themselves as the law might still allow: "[W]ere [the incompetent] of sound memory, he might allege somewhat in stay of judgment or execution." Hale, at 35. *Accord* Blackstone, at 395-96; Hawles, at 476.[14] Hawles explained that the rule existed as well to enable the condemned to prepare for death: "[I]t is inconsistent with religion, as being against christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it." *Id.* at 477. Coke provided a fourth rationale: that execution of the incompetent could not deter others from committing homicide since it "can be no example to others." Coke, at 6. Finally, Blackstone explained, the incompetent are not executed, for "*furiosus solo furore punitor*"—madness is punishment in itself. Blackstone, at 395-96. *See also* Hale, at 37. Notwithstanding these differing explanations for the common law rule, there was no disagreement concerning the rule: "[W]hatever the reason of the law is, it is plain that the law is so." Hawles, at 477.

Given the clarity and vitality of the common law rule prohibiting execution of the incompetent, the Framers undoubtedly intended that the Eighth Amendment incorporate this rule. There is not the slightest evidence that the Framers

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[14] Hawles explained that incompetency at execution could prevent the condemned from asserting "circumstances lying in his private knowledge, which would prove his innocenc[e], of which he can have no advantage, because not known to the persons who shall take upon them his defense. . . ." *Id.*

intended that execution of the incompetent be excepted from the punishments deemed cruel and unusual at the time the Eighth Amendment was adopted. To reach this conclusion, one would have to assume that the Framers intended "American law [to be] more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the colonies." *Solesbee* v. *Balkcom*, 339 U.S. at 20 (Frankfurter, J., dissenting). As to the execution of the incompetent particularly, there is no basis for such an assumption. *See, e.g.*, 1 J. Chitty, *A Practical Treatise on the Criminal Law* 620 (Amer. ed. 1819) (carrying forward the proscription on execution of the incompetent, noting that it "was always thought cruel and inhuman"); 1 W. Russell, *A Treatise on Crimes and Indictable Misdemeanors* 15 (3d Amer. ed. 1836) (same); F. Wharton, *A Treatise on the Criminal Law of the United States* 50 (2d ed. 1852) (same). As described by a twentieth century historian, when the Eighth Amendment was enacted,

> Both humanity and the law assumed, of course, that no truly insane person should be put to death as punishment for his criminal acts. Though opposition to capital punishment as such was comparatively small, only a few self-consciously ruthless intellectuals even suggested that insane criminals should suffer the maximum penalty.

C. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry in the Guilded Age* 66 (1968). Accordingly, when a legislative committee in Massachusetts wrote in 1836 about the prospect of executing an incompetent person, it spoke for the nation when it said, "[T]he proposition to do so would be rejected with unanimous indignation, even after he has committed more than one murder." Mass. Comm. on Capital Punishment, *Report* 22 (1836).[15]

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[15] The Massachusetts' committee was one of several 19th-century state commissions investigating the death penalty which all endorsed the same view regarding the unthinkability of execution of the incompetent. *See* Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan. L. Rev. 765, 779 & n.67 (1980).

In sum, the Framers sought at a minimum to secure the common standards of decency then in effect: They did not seek regression from those standards. Execution of the incompetent thus falls under the proscription of cruel punishments originally intended by the Framers.

C. Evolving Standards Of Decency Demand That The Incompetent Be Spared From Execution

In determining whether a particular punishment falls within the prohibition of the Eighth Amendment, the Court has not confined its analysis solely to whether the Framers intended to prohibit that form of punishment. "Instead, the Amendment has been interpreted in a flexible and dynamic manner." *Gregg* v. *Georgia*, 428 U.S. 153, 171 (1976) (plurality opinion). The Eighth Amendment "is not fastened to the obsolete," *Weems* v. *United States*, 217 U.S. 349, 378 (1910), but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg* v. *Georgia*, 428 U.S. at 173 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)).

The analysis of a particular punishment in light of "evolving standards of decency" involves two inquiries. First, the Court assesses contemporary standards of decency by focusing upon "objective indicia that reflect the public attitude toward a given sanction," *Gregg* v. *Georgia*, 428 U.S. at 173, including "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." *Enmund* v. *Florida*, 458 U.S. 782, 788 (1982). Second, "informed by [these] objective factors to the maximum possible extent," *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977), the Court "bring[s] its own judgment to bear on the matter," *Enmund* v. *Florida*, 458 U.S. at 788-89, in order to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." *Gregg* v. *Georgia*, 428 U.S. at 182.

Whether measured against the objective contemporary standards of decency or evaluated independently in light of

these standards, execution of the incompetent is as intolerable now as it was at the time the Eighth Amendment was adopted.

1. Contemporary standards of decency uniformly disapprove execution of the incompetent

The evaluation of contemporary standards of decency is not difficult, for the standards have remained constant for the greater part of the millennium. From the perspective of historical development, the common law has uniformly prohibited execution of the incompetent for seven hundred years. From the perspective of legislative judgment, no state which has capital punishment allows execution of the incompetent.[16]

This uncommonly uniform evidence of domestic rejection is further reflected in international practice. United Nations reports reveal that the prohibition is virtually universal. All reporting countries with capital punishment laws exclude the mentally incompetent from execution. Department of Economic and Social Affairs, United Nations Doc. ST/SOA/SD/10, *Capital Punishment: Developments 1961-1965* 10 (1967); Department of Economic and Social Affairs, United Nations, Doc. ST/SOA/SD/9, *Capital Punishment* 15-16, 88 (1962).

The universal repudiation of the execution of the incompetent should thus lead the Court, as no other "contemporary standards" analysis has, to the conclusion that such executions

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[16] In Appendix B to this brief, the relevant statutory and case law provisions of these states are set out for the Court's review. As the Court can see, all but four states expressly prohibit execution of the incompetent. The remaining four states do not expressly permit execution of the incompetent—they simply have no law on the matter. State court decisions have continued to reaffirm the prohibition against executing the presently incompetent. *See, e.g., Ex Parte Chesser*, 93 Fla. 590, 112 So. 87, 89 (1927); *People* v. *Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *State* v. *Allen*, 204 La. 513, 15 So.2d 870, 871 (1943); *Howie* v. *State*, 121 Miss. 197, 83 So. 158, 159-60 (1919); *Barker* v. *State*, 75 Neb. 289, 106 N.W. 450 (1905); *In re Smith*, 25 N.M. 48, 176 P. 819, 822 (1918).

are forbidden by the Eighth Amendment.[17] A number of logical explanations have been advanced over the years to explain the prohibition against executing the incompetent, *see* p. 14, *supra*, some of which have been criticized as unpersuasive in contemporary society. *See, e.g.*, Hazard and Louisell, *Death, The State, and The Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 383-89 (1962). Nevertheless, execution of the incompetent has been prohibited and disapproved as savage, cruel and inhuman for centuries, and it still is today. The "miserable spectacle" of execution of the incompetent should thus be rejected as readily as any other "barbaric" punishment would be rejected today.

> Such doctrines [that would permit execution of the incompetent] have been preached and practiced in National-Socialist Germany, but they are *repugnant to the moral traditions of Western civilization* and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assume the continuance of the ancient and humane principle that has long formed part of our common law.

Royal Commission on Capital Punishment, *1949-1953 Report* 98 (1953) (emphasis supplied). If objective standards of morality and human decency are the test, there could be no better evidence of those standards than the long-standing and continued repudiation of execution of the incompetent by Anglo-American jurisprudence.

2. Execution of the incompetent offends the concept of human dignity underlying the Eighth Amendment

The uniquely uniform objective indicia "weigh heavily" in the analysis of the constitutionality of executing the incompetent, *see Enmund* v. *Florida*, 458 U.S. at 797, and, as in *Enmund*

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[17] Even where contemporary standards of decency have not been as uniform as they are here, the Court has nonetheless allowed such standards to "weigh heavily in the balance" when it makes the ultimate judgment concerning the compatibility of a particular application of the death penalty with the Eighth Amendment. *Enmund* v. *Florida*, 458 U.S. at 789-97; *Coker* v. *Georgia*, 433 U.S. at 592-96, 597.

and *Coker*, should inform the Court's independent judgment that execution of the incompetent does not comport with "the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg* v. *Georgia*, 428 U.S. at 182.[18] There are, however, three additional factors which compel the conclusion that execution of the incompetent is in fundamental conflict with our society's evolving view of human dignity.

First, execution of the incompetent is "excessive" under the analysis articulated in *Gregg* and followed in *Coker* and *Enmund*, because it does not "measurably contribute[]," *Enmund*, 458 U.S. at 798, to either of the principal social purposes of the death penalty. Second, execution of the incompetent inflicts suffering beyond that which is necessarily involved in the execution of a competent person. And finally, execution of the incompetent may interfere with the condemned person's right of meaningful access to collateral remedies.

Execution of the incompetent does not accord with human dignity, because to "accord with 'the dignity of man,'" a punishment "[can]not be 'excessive.'" *Gregg* v. *Georgia*, 428 U.S. at 173. This principle requires that the state have "penological justification" for inflicting a punishment. *Id.* at 183. With respect to the death penalty, the execution of an individual offender must, therefore, serve at least one of "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.*[19]

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[18] The Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual judges; judgment should be informed by objective factors to the maximum extent possible." *Coker* v. *Georgia*, 433 U.S. at 592.

[19] One other social purpose of the death penalty has been noted by the Court: "the incapacitation of dangerous criminals." *Id.* at 183 n.28. While incapacitation may be "a legitimate consideration in a capital sentencing proceeding," *Spaziano* v. *Florida*, ____ U.S. ____, 104 S.Ct. 3154, 3163 (1984), it "has never been embraced as a sufficient justification of the death penalty." *Id.* This is so because incapacitation simply means removal from society, "safe-keeping." Hazard and Louisell, *Death, the State, and the Insane: Stay of Execution*, at 389 n.24. And as observed in relation to the incompetent condemned person, "[T]he prisoner is for all practical purposes as fully incapacitated in a mental hospital as he is in death." *Id.*

> Unless the death penalty when applied to one in [petitioner's] position *measurably contributes* to one or both of these goals, it is "nothing more than the purposeless and needless imposition of pain and suffering". . . .

Enmund v. *Florida*, 458 U.S. at 798 (quoting *Coker* v. *Georgia*, 433 U.S. at 592) (emphasis supplied). Execution of the incompetent is "excessive" under this analysis, because it does not "measurably contribute" to the goals of retribution or deterrence.

Retribution has been understood as "an expression of society's moral outrage at particularly offensive conduct." *Gregg* v. *Georgia*, 428 U.S. at 183 (citing H. Packer, *Limits of the Criminal Sanction* 43-44 (1968)). For society's moral outrage to be satisfied through the carrying out of punishment, the offender must be perceived as receiving the punishment he or she "deserves." *Furman* v. *Georgia*, 408 U.S. at 308 (Stewart, J., concurring). *See also* Royal Commission on Capital Punishment, *Minutes of Evidence, Dec. 1, 1949* 207 (1950) (quoted in *Gregg* v. *Georgia*, 428 U.S. at 183 n.30). The punitive act can be what is fully deserved, however, only if the offender is able to comprehend its significance. "To give someone her just deserts implies her recognition that those deserts are just." Gale, *Retribution, Punishment, and Death*, 18 U.C.D. L. Rev. 973, 1031 (1985).[20] In the death penalty context, the condemned must be able to understand, first, that he is being put to death, and second, that he is being put to death because he killed.

Against this background, execution of the incompetent quite clearly makes no measurable contribution to the retributive purpose of the death sentence. Society's need for the condemned to recognize that her suffering is deserved because of

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[20] Retribution is thus significantly different from "vengeance" or "retaliation," neither of which would be concerned with the offender's ability to understand the connection between the offense and the punishment. *See* Hazard and Louisell, at 386. The Court has never approved vengeance as a penological justification for the death penalty. Thus, retribution retains its character as a sufficient social purpose only if it retains its distinction from vengeance.

her prior misconduct cannot be satisfied by execution of the incompetent:

> [W]e consider it both wrong and useless to punish those, such as the insane, who lack the capacity for that recognition. The prevailing consensus, that it is unjust to execute the insane even though they may have been sane when their crimes were committed and otherwise deserve execution, may stem from a partial if largely unconscious acknowledgement that it is important for the offender to realize that punishment is the effect of crime.

Gale, 18 U.C.D. L. Rev. at 1031-32 (footnote omitted).[21] Thus, "the societal goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance." Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458-59 (1967). When applied to a person in Mr. Ford's condition, the death penalty does *not* therefore, "measurably contribute[]," *Enmund* v. *Florida*, 458 U.S. at 798, to the goal of retribution and may even defeat it.

Similarly, execution of the incompetent makes no measurable contribution to the deterrence of others. Assuming, as the Court did in *Gregg*, "that there are murderers . . . for whom the threat of death . . . undoubtedly is a significant deterrent," 428 U.S. at 185-86, the deterrent effect of the death penalty upon such people is neither strengthened by execution of the incompetent, nor weakened by refusal to execute the incompetent. As Hazard and Louisell have explained, this is so because "the offender cannot, at the time he is about to commit the crime, foresee that after capture, conviction and sentence, he

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[21] Indeed, this commentator opines that the inability to exact retribution on an incompetent prisoner may be the *primary* reason that we forbid his or her execution: "that we believe punishment appeals, whether successfully or not, to the offender's consciousness and conscience—may help explain our moral distaste for killing those who cannot understand either what we are doing or why we are doing it." *Id.* at n.167.

will become insane" and thus fortuitously avoid the death sentence. *Id.* at 385.[22]

For these reasons, execution of the incompetent makes no measurable contribution to the goal of deterrence. "[I]t does not materially dilute the deterrent effect of the death penalty to withhold it if the prisoner becomes insane [,] . . . [and] there is no deterrent effect in executing him . . . ." Hazard and Louisell, at 385. Accordingly, "[t]he reason for withholding the ultimate sanction from the insane prisoner is that his execution is *unnecessary* to the accomplishment of the end of deterrence." *Id.* at 386 (emphasis supplied). Plainly, execution of the incompetent makes no measurable contribution to the goal of deterrence.

The second reason that execution of the incompetent does not accord with human dignity is that it inflicts suffering beyond that which is necessarily involved in the execution of a competent person. In holding that capital punishment is not *per se* cruel and unusual, the Court has concluded that even though there is pain inflicted in the course of an execution, "the necessary suffering involved in any method employed to extinguish life humanely" does not render capital punishment cruel and unusual. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1947). At the same time, the Court has recognized that the Constitution cannot tolerate "the infliction of *unnecessary* pain in the execution of the death sentence." *Id.* at 463 (emphasis supplied). Admittedly, in *Francis* the Court was considering *methods* of execution that, "inherent in the

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[22] The unforeseeability of mental illness is, for these purposes, no different from the unforeseeability of physical illness, for mental illness is no more the product of the human will than is physical illness. This is particularly so with schizophrenia, the illness suffered by Mr. Ford, for

> [s]chizophrenia is a brain disease, now definitely known to be such. It is a real scientific and biological entity as clearly as diabetes, multiple sclerosis, and cancer are scientific and biological entities. It exhibits symptoms of a brain disease, symptoms which include impairment of thinking, delusions, hallucinations, changes in emotions, and changes in behavior. And, like cancer, it probably has more than one cause.

E. Torrey, *Surviving Schizophrenia* 2 (1983).

method," inflicted suffering beyond that "necessar[ily] . . . involved" in the methods of execution "employed to extinguish life humanely." *Id.* at 464. The principle involved—that it is cruel to inflict more pain and suffering than the norm requires—is nonetheless helpful in assessing whether execution of the incompetent is in keeping with human dignity, for execution of the incompetent does inflict suffering *beyond* that which is necessarily inflicted in the execution of a competent person.

Through the work of scholars who have studied the process of dying, it is now known that those who know they are facing imminent death experience common psychological "stages": first denial, then anger, and then depression. However, the dying often "work through" these stages, by taking care of "unfinished business" and by mourning the impending loss of all that is known to be meaningful. Through this process people are able to die with dignity: at peace and in a stage of acceptance. *See, e.g.*, E. Kubler-Ross, *On Death and Dying* (1969); O. Brim, H. Freeman, S. Levine, and N. Scotch, eds., *The Dying Patient* (1970); S. Stephens, *Death Comes Home* (1973); R. Williams, *To Live and to Die—When, Why, and How* (1973); E. Kubler-Ross, *Questions and Answers on Death and Dying* (1974). The suffering and anguish of those who know they are facing death is thus ameliorated by this universal psychological process.

This suffering is not ameliorated, however, in the life of the person who becomes incompetent prior to execution, for he has lost the capacity to experience the normal psychological processes associated with dying. This loss is strikingly revealed in Mr. Ford's case, for his incompetency is due to schizophrenia. Characterized as "the most tragic chronic disease remaining in twentieth-century western civilization," E. Torrey, *Surviving Schizophrenia* at 4, "'[s]chizophrenia' is a cruel and discordant term, just like the disease it signifies," *id.* at 1, for it thoroughly undermines a person's ability to perceive accurately and to understand what is happening in his or her life.

> Schizophrenia is marked by delusions, hallucinations, and disorders of thought; it attacks the will, clarity of

> thinking, the emotions—in short, those mental processes that differentiate us from the other organisms in our environment. . . . The schizophrenic is often frightened of the world around him or her. Things and people appear menacing. The world is confusing and unpredictable. Eventually, the schizophrenic's terror, coupled with an inability to direct and control his or her own thought processes, brings about an abrupt withdrawal from society. This withdrawal, while it may temporarily ease the schizophrenic's sense of threat from the environment, only serves to deepen the isolation and loneliness.

R. Restak, *The Brain* 273-74, 276 (1984).

When a person in this condition must face death, he is denied access to the process that leads to dying with peace and in a stage of acceptance: in short, he is denied the opportunity to die with dignity. Unable to sort out the reasons that he will be killed, to reflect upon his life in an attempt to find meaning in it,[23] to identify the "loose ends" or unfinished business of his life (much less to attend to those matters), or to engage in the crucial process of making peace with God, the schizophrenic person is without the normal human tools necessary to prepare for and accept death. The schizophrenic who faces execution faces the terror of death without the capacity that the competent person has to understand his life and to make peace with his life and his death.

Mr. Ford, for example, "has at best only minimal contact with the events of the external world." JA 109 (supplemental report of Dr. Kaufman). "His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide

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[23] As Dr. Kubler-Ross recounts, toward the end,

> Many of my dying patients have relived experiences from their past life. I think this is a period of time when the patient has switched off all external input, when he begins to wean off, when he becomes very introspective, when he tries to remember incidents and people important to him, and when he ruminates once more about his past life in an attempt to, perhaps, summarize the value of his life and to search for meaning.

E. Kubler-Ross, *Questions and Answers on Death and Dying* at 35.

he committed and the death penalty." JA 96 (report of Dr. Kaufman). Further, Mr. Ford's world is filled with terrifying people and events that we can neither know nor understand. His "delusional thinking . . . represents a desperate attempt to regain control because he is strictly confined and feels harassed, powerless, and increasingly fragmented." JA 91 (report of Dr. Amin). In this condition the terror inherent in facing execution will be many times amplified for Mr. Ford by the terror and confusion produced by his illness. He experiences the terror but is denied the ameliorative effects of understanding.

The additional suffering—beyond the norm for execution—that Mr. Ford must experience is analogous to the additional suffering experienced by a person who is treated with a therapy causing painful side effects but who cannot understand why the treatment is necessary. Such a situation was addressed in *Superintendent of Belchertown School* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), where the court held that the guardian of a profoundly retarded man could properly decide not to permit radical chemotherapy treatments for the man's terminal illness. In approving the guardian's exercise of judgment, the court reasoned

> "If he is treated with toxic drugs he will be involuntarily immersed in a state of painful suffering, the reason for which he will never understand. Patients who request treatment know the risks involved and can appreciate the painful side-effects when they arrive. They know the reason for the pain and their hope makes it tolerable." . . . Saikewicz would have no comprehension of the reasons for the severe disruption of his formerly secure and stable environment occasioned by the chemotherapy. *He therefore would experience fear without the understanding from which other patients draw strength.*

373 Mass. at 750, 754, 370 N.E.2d at 430, 432 (emphasis supplied).

Similarly, because the incompetent face execution without the ameliorative effects of understanding, execution of the incompetent inflicts suffering beyond that involved in the

humane extinguishment of life. As already noted, the common law commentators understood this added suffering though they expressed it in the intellectual context of their times.[24] There can be little doubt that this awareness informed the universal condemnation of such executions as "a miserable spectacle . . . of extreme inhumanity and cruelty." The standard of decency that accords with human dignity should be no less today.

Finally, execution of the incompetent is in discord with our society's evolving standards of decency because execution of the incompetent may interfere with the condemned's right of meaningful access to collateral remedies—a right of "fundamental importance . . . in our constitutional scheme," *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969), that is protected by the Constitution. *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977). Just as a person must be competent in order to make the myriad of decisions, voluntarily and intelligently, that must be made at trial, a person must be competent in order to exercise meaningfully his right of access to collateral remedies. Unlike appeals, which concern claims already litigated, collateral proceedings are "original actions seeking new trials . . . frequently rais[ing] heretofore unlitigated issues . . . ." *Id.* at 827-28. Accordingly, like trials, collateral proceedings require the condemned to be competent—to have the capacity to disclose relevant facts that are known only to him and to make rational and intelligent decisions concerning the issues in the proceeding. *Cf. Dusky* v. *United States*, 362 U.S. 402 (1960). This requirement is most apparent if the collateral proceeding involves a claim of ineffective assistance of counsel for failure to investigate, but it is present whenever the historical facts

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[24] *See* Hawles, *Remarks on the Trial of Mr. Charles Bateman* at 477. ("[I]t is inconsistent with religion, as being against christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it").

underlying a constitutional claim are uniquely within the prisoner's knowledge.[25]

Thus, the state's execution of an *incompetent* prisoner may amount to a denial of access to the courts. In capital cases, wholly unlike non-capital cases, the execution of the sentence absolutely denies further access to the courts. *Cf. Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978). From the perspective of the constitutional guarantee of the right of access to the courts, therefore, execution should be permitted only if the purpose of the guarantee—"to enable those unlawfully incarcerated to obtain their freedom," *Johnson* v. *Avery*, 393 U.S. at 485, or to enable those unlawfully sentenced to death to regain their lives—has been served. Concededly, this requires

> . . . a practical judgment whether in the particular situation "the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course"; and whether the criminal defendant's entitlement to "all the protections which . . . surround him under our system prior to conviction and during trial *and appellate review*" [emphasis mine] have been accorded.

Shaw v. *Martin*, 613 F.2d 487, 491 (4th Cir. 1980) (Phillips, J.) (bracketed material and emphasis in text) (quoting *Evans* v. *Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., Circuit Justice)). *See also Barefoot* v. *Estelle*, 463 U.S. 880, 887-88 (1983). Where the legal issues have not been "sufficiently litigated," our evolving standards of decency require that the execution be stayed, for "were [the condemned] of sound memory, he might allege somewhat in stay of judgment or execution." Hale, *History of the Pleas of the Crown* at 35.[26]

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[25] *See Shriner* v. *Wainwright*, 735 F.2d 1236, 1240-41 (11th Cir.), *cert. denied*, ____ U.S. ____, 82 L.Ed.2d 852 (1984) (a habeas corpus petitioner will be held to have waived his right to present facts and claims if he *personally* fails to assert such facts and claims as were known to him at the time of the habeas corpus proceeding, upon counsel's negligent or deliberate failure to assert such facts and claims on his behalf).

[26] Mr. Ford's case may be one in which meaningful access to collateral remedies has not been denied by his incompetency, for he proceeded through

For these reasons, the Court's judgment should confirm the objective indicia of contemporary standards, with a determination that execution of the incompetent violates the Eighth Amendment.

D. Florida's Statutory Competency-Determination Procedure Fails To Provide The Reliable Fact-Finding Procedure Required By The Eighth Amendment's Prohibition Against Execution Of The Incompetent.

Since the Eighth Amendment provides a substantive right to Mr. Ford not to be executed while incompetent, Florida's attempt to execute him while he is incompetent—like any other violation of rights guaranteed by the Bill of Rights—presents a federal question. It requires that the federal habeas corpus court hear and determine independently the factual question of whether Mr. Ford *is* incompetent, in the same manner and for the same reason that it would determine, for example, the voluntariness of a confession or mental competence during trial.

Though the federal courts decide such federal questions, as a matter of federal law and comity the habeas court need not hold an evidentiary hearing if the state courts have provided a full and fair hearing on the federal question, *e.g.*, *Townsend* v. *Sain*, *supra*, and must presume state court findings of historical fact to be correct if there was such a full and fair determination, 28 U.S.C. § 2254(d). In this case, however, the Florida state courts have eschewed their ability to determine whether Mr. Ford is presently incompetent, JA 10, and have thus left resolution of the federal question to a purely executive, *ex parte* proceeding that permits no evidentiary hearing and is entirely non-adversarial. Since the Florida state determination was nonjudicial, hence entitled to no deference under section 2254, and was procedurally defective in addition, the federal

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an initial state post-conviction proceeding and an initial federal habeas proceeding in the district court before becoming incompetent. However, that this rationale may not be applicable in Mr. Ford's particular circumstances in no way detracts from its persuasiveness in establishing that execution of the incompetent violates the Eighth Amendment.

habeas corpus court must hear and determine independently the factual question of whether Mr. Ford is incompetent. The district court did not hold such a hearing on Mr. Ford's documented allegations of incompetency, for it believed that Mr. Ford's constitutional rights, if any, were adequately protected by Florida's executive procedure for the determination of competency. JA 164.[27] This case must be remanded with instructions to hold that hearing.

1. The ex parte, non-adversarial Florida procedure

By statute, Florida has created an executive procedure through which the governor determines a death-sentenced individual's competency to be executed. *Fla. Stat.* § 922.07 (1983). In Mr. Ford's case, for the first time, the Supreme Court of Florida held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." *Ford* v. *Wainwright*, 451 So.2d at 475; JA 10.[28]

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[27] In addition to its ruling on the merits, the district court stated alternatively that Mr. Ford had abused the writ because his petition was not filed earlier. JA 160-64. In view of its ruling on the merits, the court of appeals did not directly reach the question though the majority did opine that the district court's "summary holding of abuse of the writ . . . is troublesome under the facts presented." JA 184 n.1. The stay panel had previously rejected the district court's finding. JA 167-69. Under the facts of this case, abuse of the writ is wholly inappropriate. In sum, the facts of record show: (a) that Mr. Ford was *competent* when his first petition was filed and decided; (b) that behavioral changes began to occur during the time Mr. Ford's appeal was pending from the denial of that petition and Mr. Ford's counsel engaged a psychiatrist to recommend treatment; (c) that treatment was not forthcoming at the prison and Mr. Ford subsequently became incompetent; (d) that counsel immediately pursued available state remedies on behalf of Mr. Ford; (e) that Mr. Ford pursued his state remedies for six months thereafter and exhausted those remedies only when the governor announced a competency decision by signing a death warrant; and (f) that Mr. Ford was in court asserting the claim of incompetency within a few days after his warrant was signed. There was no abuse.

[28] The Florida Court had previously held, prior to the enactment of the statute, that there was a right to a judicial determination by the trial judge where a condemned person was alleged to be incompetent. *Ex Parte Chesser*, 93 Fla. 291, 111 So. 720 (1927); *Hysler* v. *State*, 136 Fla. 563, 187 So. 261 (1939). The court had not had an opportunity to address the effect of § 922.07

This procedure is *ex parte* within the executive branch. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. *Id.* Defense counsel and the prosecutor "may be present at the examination," *id.*, but counsel is not allowed to participate in or interfere with the examination.[29] If the convicted person has no counsel, the trial court "shall appoint counsel to represent him." *Id.*

Though provision is made for appointment of counsel, no provision is made for a hearing or for any other process through which counsel can advocate the interests of her client. Consistent with these provisions, the present Florida governor has a "publicly announced policy of *excluding all advocacy on the part of the condemned* from the process of determining whether a person under a sentence of death is insane." *Goode* v. *Wainwright*, 448 So.2d at 1001 (emphasis supplied).[30]

After receiving the reports of the three appointed psychiatrists, the governor simply "decides" whether the condemned meets the competency test set out in the statute. §§ 922.07(2), (3). There is no hearing or any other procedure for resolving conflicts or through which the condemned or her representa-

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on this right, however, until 1984, in Mr. Ford's case and in *Goode* v. *Wainwright*, 448 So.2d 999 (Fla. 1984). In *Goode*, decided one month before Mr. Ford's case, the court appeared to leave open the prospect of judicial proceedings for the determination of execution competency. *See Goode* v. *Wainwright*, 731 F.2d at 1483 ("he was free to assert this contention in *state* and federal courts from the time that he was sentenced to death" (emphasis supplied)).

[29] Thus, in ordering Mr. Ford's examination, Governor Graham provided that "Counsel for the inmate and the State Attorney may be present but *shall not participate in the examination in any adversarial manner.*" Executive Order No. 83-197, issued December 9, 1983 (emphasis added).

[30] That the present Florida governor could make such a policy, demonstrates in a clear fashion, the opportunity for caprice in the Florida process.

tive can advocate or challenge the appointed psychiatrists' reports. If the governor decides that the condemned person is not competent, he orders the person committed to the state hospital. § 922.07(3). If he decides that he is competent, the governor issues a death warrant ordering execution. § 922.07(2). There are no written findings and there is no review of the governor's decision.

2. The Florida procedure is inadequate to enforce the Eighth Amendment right

In order to vindicate federal rights, habeas corpus depends critically upon accurate and reliable fact-finding. If the facts have been reliably found by the state courts on the basis of a full hearing, the federal habeas court must presume that the findings are correct and is not required to hold a new fact-finding proceeding. However, if there has been no fact-finding by the state courts or if the fact-finding is unreliable, the federal habeas court *must* hold a *de novo* evidentiary hearing. *Townsend* v. *Sain*, 372 U.S. at 312. Thus, the Eighth Amendment prohibition of the execution of the incompetent, requires that the federal habeas court hear and determine independently the factual questions underlying a petitioner's competency, "unless the state-court trier of fact has after a full hearing reliably found the facts." *Id.*[31]

As we have shown, however, in Mr. Ford's case the state determination was nonjudicial and further, was the result of a defective procedure, since neither the governor, the state courts, nor the district court held an evidentiary hearing. There was only an *ex parte* § 922.07 proceeding. *Townsend* and its statutory counterpart, 28 U.S.C. § 2254(d), have always required that a "State *court* of competent jurisdiction," § 2254(d) (emphasis supplied), find the facts if the facts are to be presumed correct. 372 U.S. at 312-13. Since no state *court* has

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[31] As the Court made clear in *Maggio* v. *Fulford*, 462 U.S. 111 (1983), resolution of the facts underlying a competency claim may, like any other factual matter, be determined in the state courts, subject to the provisions of *Townsend* v. *Sain* and 28 U.S.C. § 2254(d).

ever considered whether Mr. Ford was competent, the need for a federal evidentiary hearing is manifest. Nevertheless, even if a non-judicial state trier of fact could make reliable fact-findings entitled to deference under 28 U.S.C. § 2254(d), the governor acting under § 922.07 cannot. There was no hearing, much less a full and fair hearing, to serve as a basis for fact-finding. *Cf. Townsend*, 372 U.S. at 313; 28 U.S.C. § 2254(d)(1), (2). There were no findings of fact, except for those implied in the finding that Mr. Ford was competent by virtue of his death warrant having been signed. *Cf. Townsend*, 372 U.S. at 312; 28 U.S.C. § 2254(d). Further, any implied findings of fact were erroneous, because there were "found" under Florida's, rather than the Eighth Amendment's, standard of competency. *Cf. Townsend*, 372 U.S. at 314-15. Finally, the absence of judicial fact-finding was not cured by judicial review, for there was no judicial review of the governor's implied fact-finding or his fact-finding procedure; nor can there be under the Florida Supreme Court's decision in Mr. Ford's case.[32]

While these defects in the § 922.07 proceeding, without further discussion, clearly compel a *de novo* hearing in the district court, it is worth emphasizing why this is so. The *Townsend* Court's requirement of fact-finding on the basis of a full and fair *hearing*—as the only acceptable means of assuring reliable fact-finding—is well-rooted in the Court's jurisprudence, both before and after the *Townsend* decision. The Court has long recognized that a hearing is necessary to provide the "adversarial debate our system recognizes as essential to the truth seeking function," *Gardner* v. *Florida*, 430 U.S. at 359, for "no better instrument has been devised for arriving at the truth," *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). *See also Goss* v. *Lopez*, 419 U.S. 565, 579-80 (1975); *Fuentes* v. *Shevin*, 407 U.S.

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[32] *Cf. Mattheson* v. *King*, 751 F.2d 1432, 1447 (5th Cir. 1985) (deferring to state court's determination of competency following an evidentiary hearing, though not deciding whether the Constitution prohibits execution of the mentally incompetent).

67, 80 (1972); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

There is no more compelling example of the crucial role of the adversarial hearing in the truth seeking function than in the resolution of mental health issues. As the Chief Justice has observed, "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington* v. *Texas*, 441 U.S. 418, 430 (1979).[33] It is this very reason that "justif[ies] the requirement of adversary hearings." *Vitek* v. *Jones*, 445 U.S. 480, 495 (1980). *Accord Barefoot* v. *Estelle*, 463 U.S. at 899-903. Without a hearing, in which the experts explain their opinions as well as the data and reasoning process upon which their opinions are based, fact-finders simply cannot make accurate, reliable determinations of mental health facts when the experts' opinions are in conflict. *See Ake* v. *Oklahoma*, ___ U.S. ___, 105 S.Ct. 1087, 1096 (1985) (by "laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them").

Even if the facts are found on the basis of a full and fair adversarial hearing, however, *Townsend* imposes one additional requirement to assure that the fact-finding procedures produce accurate, reliable findings. The standard of law that guides the fact-finder must comport with the constitutional right at issue. 372 U.S. at 314-15. In this respect, Florida's 922.07 procedure is also crucially defective, for the standard that Florida has adopted—"whether [the condemned] understands the nature and effect of the death penalty and why it is to be imposed on him"—only partially reflects the reasons why the Eighth Amendment prohibits execution of the incompe-

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[33] *Accord Parham* v. *J.R.*, 442 U.S. 584, 609 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); *Drope* v. *Missouri*, 420 U.S. 162, 176 (1975); *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956); *Leland* v. *Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, joined by Black, J.J., dissenting).

tent. As a result, it is inadequate to vindicate that constitutional guarantee.

To enforce the Eighth Amendment's prohibition, the standard of competency must reflect the rationale underlying the prohibition against executing the incompetent. *Cf. Drope* v. *Missouri*, 420 U.S. at 171-72 (tracing the policy reasons underlying the standard of trial competency). As we have shown, the incompetent are spared from execution for three reasons relevant here: (1) execution of the incompetent does not contribute to the goal of retribution because of the incompetent person's inability to understand that he is being put to death or that he is being killed because he killed; (2) execution of the incompetent inflicts suffering beyond that which is necessarily involved in the execution of the competent because of the incompetent person's inability to understand the reasons for his death or to prepare for death; and (3) execution of the incompetent may interfere with the incompetent person's right of access to collateral remedies. Consistent with these three reasons, a three-part standard[34] is required rather than the single-element standard utilized by Florida:

First, the condemned must have sufficient intellectual and emotional capacity to understand the nature and effect of the death penalty and why it is to be carried out against him.[35] This standard incorporates both of the elements necessary for the satisfaction of society's need for retribution, as well as one of the elements necessary to prevent infliction of the greater

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[34] The standard should have only three components, because the fourth reason underlying the Eighth Amendment prohibition—related to deterrence—does not give rise to a test of competency. The need to deter prospective murders is neither weakened by the exemption of the incompetent from execution nor strengthened by the execution of the incompetent. *See* discussion, pp. 21-22, *supra*.

[35] This standard is substantially the same as Florida's standard and is similar to a component of the competency standard in Georgia, Illinois, Mississippi, Missouri, New Jersey, New Mexico, Ohio, and North Carolina. *See* Appendix B.

suffering inherent in executing the incompetent (i.e., why the death penalty is to be carried out against him).

Second, the condemned must be sufficiently free from the symptoms of psychosis (or similar mental disease or defect) to have the intellectual and emotional capacity necessary to prepare for death.[36] This standard provides for the other element necessary to prevent infliction of the greater suffering inherent in executing the incompetent.

Third, the condemned must have sufficient intellectual and emotional capacity to know any fact which might exist which would make his punishment unjust or unlawful and to convey such information to his attorney.[37] This standard incorporates the elements necessary to prevent incompetency from interfering with the condemned person's right of access to collateral remedies.

Accordingly, basic principles of federal law for resolution of constitutional issues require an independent determination by the federal courts of Mr. Ford's competency.

It must be emphasized that these are not hollow concepts in the present case. On behalf of Mr. Ford, substantial documentary evidence was proffered to the district court showing first the progression, and then the final result of Mr. Ford's severe psychosis. All of the doctors who examined Mr. Ford, except one whose methodology is most seriously in question, found him to be psychotic. The one psychiatrist who examined Mr. Ford over the longest period of time and who studied all available documentation and history found him to be, without question, incompetent under the Florida statutory standard. In the

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[36] This test appears to be consistent with a component of the test described in Oklahoma: "[T]he mental powers being wholly obliterated . . . a being in that deplorable condition . . . has no understanding of the nature of the punishment about to be imposed." Appendix B.

[37] This standard is substantially the same as a component of the standard in Illinois, Mississippi, New Mexico, Ohio, and Oklahoma, and is similar to a component of the standard in Georgia, Missouri, New Jersey, North Carolina, and Utah. *See* Appendix B.

opinion of two nationally-reputed psychiatric experts, the half-hour group examination undertaken by the governor's doctors "fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation." JA 112. Accordingly, there *are* substantial factual issues in this case. These issues can only be resolved by a fair evidentiary proceeding where all of the facts may be spread upon the record for determination by a neutral decision-maker. Mr. Ford *is* presently incompetent. All that is requested is an opportunity to establish that fact by reliable proceedings, as are provided to any habeas corpus applicant at the bar of the federal court.

II.

FLORIDA'S STATE-CREATED ENTITLEMENT TO BE SPARED FROM EXECUTION IF INCOMPETENT GIVES RISE TO A FEDERALLY PROTECTED RIGHT TO A FAIR AND RELIABLE DETERMINATION OF COMPETENCY IN A PARTICULAR CASE

Apart from the Eighth Amendment, the Constitution is implicated in one further respect by Florida's attempt to execute a person whose competence is seriously in question. The procedural due process protections of the Fourteenth Amendment are triggered by Florida's state-created right to be spared from execution when incompetent. Even though the *Solesbee* Court decided that the state-created interest in being spared from execution when incompetent did not invoke the procedural protections of the Fourteenth Amendment, the principles underlying *Solesbee's* holding have evolved to such an extent in the intervening decades, that *Solesbee* is no longer of controlling precedential value. Under contemporary principles of analysis, Florida's state-created interest in being spared from execution when incompetent is an entitlement now clearly protected by the Fourteenth Amendment. Because of this, the Court must consider anew the applicability of the Due Process Clause to the states' procedures for determining whether a condemned person is incompetent under a state-created right not to be executed when incompetent.

A. *Solesbee* v. *Balkcom* No Longer Controls In Determining The Process Due The Condemned In The Administration Of The State-Created Right To Be Spared From Execution When Incompetent

Solesbee v. *Balkcom* was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights," not "privileges." *See, e.g., Ughbanks* v. *Armstrong*, 208 U.S. 481 (1908); *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *Phyle* v. *Duffy*, 34 Cal.2d 144, 208 P.2d 668, 677-78 (1949) (Traynor, J., concurring in judgment). The classification of a particular interest as a right or a privilege turned, not upon the nature of the interest, but upon the procedure which was used to protect the interest. *See Arnett* v. *Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., joined by Blackmun, J., concurring in part); *id.* at 210-11 & n.7 (Marshall, J., joined by Brennan and Douglas, J.J., dissenting); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

In keeping with these principles, the *Solesbee* Court determined the applicability of the Due Process Clause by examining the procedure historically utilized to determine competency at the time of execution. It found that the interest was protected only by "an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence." 339 U.S. at 13. Reasoning that the commitment of analogous matters, such as sentencing, to the "wide discretion" of judges had led it to "emphasize[] that certain trial procedure safeguards are not applicable to the process of sentencing," 339 U.S. at 12 (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)), the Court explained that "[t]his principle applies even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction." *Id.* Because the procedure traditionally used to protect the interest in being spared from execution when incompetent was an appeal to discretion, and because the commitment of post-conviction matters wholly to the discretion of the decision-maker had never called for procedural safeguards, the Court reasoned that procedural safeguards were inapplicable to the determination of post-conviction incompetency. In short, the interest in

being spared from execution when incompetent was only a privilege.

Since the decision in *Solesbee*, two significant evolutionary developments in due process jurisprudence have effectively overruled it as controlling precedent.

First, the Court has firmly discarded "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971). *See also Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Bell* v. *Burson*, 402 U.S. 535, 539 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970). Rather than examining the procedure used to protect a particular interest, modern due process analysis focuses upon the "'objective expectation [of the individual], firmly fixed in state law and official. . . practice,'" *Vitek* v. *Jones*, 445 U.S. 480, 489 (1980). If the individual has a "justifiable expectation," *id.*, that the state will not arbitrarily withdraw a benefit conferred or withhold a benefit expected to be conferred, due process protects that individual's interest against "arbitrary disregard. . .," *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980). *See also Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7-11 (1979); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982).

While there has been no application of the state-created rights analysis to the interest of a condemned person in being spared from execution if incompetent, the analysis has been applied to two related interests—parole and probation. Under the right/privilege analysis, these interests were seen as identical to the interest of the condemned in being spared from execution if incompetent: each had previously been classified only as "privileges," which the state could grant or revoke wholly within its discretion because each "comes as an act of grace to one convicted of crime." *Escoe* v. *Zerbst*, 295 U.S. at 492; *Ughbanks* v. *Armstrong*, *supra*. *See Solesbee* v. *Balkcom*, 339 U.S. at 11 ("[p]ostponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general"). Despite this view, the

Court has since held—under the state-created rights analysis—that the states can create entitlements to parole and probation that are protected by due process. Such an entitlement was first found in connection with the interest of a parolee in not having his parole arbitrarily revoked, *Morrissey* v. *Brewer*, 408 U.S. at 481-82, then applied to the revocation of probation, *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 & n.4 (1973), and finally, to the initial grant of parole, *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11-12 (1979).

Since state-created rights analysis has caused a reversal of earlier decisions holding the Due Process Clause inapplicable to probation and parole, it should lead to the same result in a state which has created a "justifiable expectation" that a condemned person will be spared from execution when incompetent. Under modern due process analysis, the condemned person who is incompetent, like the probationer, "can no longer be denied due process, in reliance on the dictum in *Escoe* v. *Zerbst*, [295 U.S. at 492], that probation [or a stay of execution while incompetent] is an 'act of grace.'" *Gagnon* v. *Scarpelli*, 411 U.S. at 782 n.4. Accordingly, the abandonment of the right/privilege analysis requires re-evaluation of the applicability of the Due Process Clause to the determination of competency at execution.

A second post-*Solesbee* development in due process jurisprudence further confirms the need for re-evaluation. As already noted, the *Solesbee* Court relied significantly upon *Williams* v. *New York*, *supra*, to support its determination that the Due Process Clause was inapplicable to the determination of competency at the time of execution. Since *Williams* "emphasized that certain trial procedure safeguards [were] not applicable to the process of sentencing," *Solesbee*, 339 U.S. at 12, the *Solesbee* Court reasoned that those safeguards could not be applicable to the determination of competency *after* sentencing. *Id.* In the years since the *Solesbee* decision, however, this aspect of the *Williams* analysis has been discarded.

As Justice Stevens noted for a plurality of the Court in *Gardner* v. *Florida*, "it is now clear that the sentencing pro-

cess, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358. Because of this, the Court has required not only that sentencing proceedings satisfy due process but that capital sentencing proceedings provide heightened procedural safeguards, that may not be required in non-capital proceedings, in order to avoid the risk of an unwarranted death sentence.[38] With the evolution of these principles, the jurisprudential premise that *Williams* provided for the reasoning of the *Solesbee* Court has been significantly eroded. Accordingly, the Court should reconsider whether, in light of the unique applicability of the Due Process Clause to capital sentencing proceedings today, the Due Process Clause should also extend to proceedings for determining competency at execution.

Admittedly, the heightened due process protections which the Court began to require in capital sentencing proceedings in the decade of the 1970's were developed to assure reliability in the decision to impose death, not in the decision to carry out an already-imposed (and otherwise legally proper) death sentence. However, the rationale for heightened due process protections in the sentence imposition proceeding is equally compelling in a proceeding to determine whether to carry out a death sentence against a person who appears to be incompetent. The rationale is based upon "the penalty of death [being] qualitatively different from a sentence of imprisonment, however long." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). The "qualitatively different" character of death requires as well that the determination of competency at execution be reliable, even if all the safeguards attendant to the initial sentencing decision are not required. As Justice Frankfurter reasoned in his dissent in *Solesbee*, the inquiry into competency

> must be fair in relation to the issue for determination. In the present state of the tentative and dubious knowledge as to mental diseases and the great strife of schools in regard to them, it surely operates unfairly to make such determinations not only behind closed doors but without

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[38] *See Caldwell* v. *Mississippi*, ____ U.S. ____, 105 S.Ct. 2633, 2639-40 & n.2 (1985) (citing cases).

> any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance.

339 U.S. at 24-25. Echoing these strains in dissent in Mr. Ford's case, Judge Clark brought the need for "fair[ness] in relation to the issue for determination" into post-*Furman* perspective:

> Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedures used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine his *present* death eligibility are still required.

752 F.2d at 533; J.A. 197 (emphasis in original).

For these reasons, the evolution of due process jurisprudence since *Solesbee* requires a new evaluation of the applicability of the Due Process Clause to the determination of competency at the time of execution. *Solesbee* can no longer be relied on as a satisfactory resolution of this issue.[39]

B. Florida Has Created As A Matter Of State Law A Justifiable Expectation That A Condemned Person Who Is Incompetent At The Time Of Execution Will Not Be Executed

Florida has, by case law and statute, declared that a condemned person who is incompetent *shall not* be executed.

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[39] The need for re-evaluation is just as compelling as the request recently made by the petitioner in *Ake* v. *Oklahoma*, ____ U.S. ____, 105 S. Ct. 1087 (1985), where the Court reconsidered another *Solesbee*-era due process decision, *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 568 (1953), because of the erosion of the jurisprudential basis of that decision by subsequent developments. The Court explained that its decision to reconsider *Smith* was primarily the result of the evolution since *Smith* of "elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to receive a fair hearing," as well as "the extraordinarily enhanced role of psychiatry in criminal law today." 105 S.Ct. at 1098. The evolution of the "elemental constitutional rights" referred to in *Ake* is not precisely the evolution that requires reconsideration of the issue previously decided in *Solesbee*. However, the evolution of the Due Process Clause in the respects just discussed *is parallel to*—and just as significant as—the evolution that led the Court to reconsider the issue previously decided in *Smith*.

Whether this declaration has created a right protected by the Due Process Clause can be determined only by examining "the *nature* of the interest at stake" as that interest is now defined in Florida law. *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972) (emphasis in original). When this is done, the conclusion is unavoidable that Florida has created a right to be spared from execution when incompetent that is protected by the Due Process Clause.

In order to determine the "nature of the interest at stake," the Court has explained that the actual language of the decisions and statutes which have created the interest must be analyzed. *See, e.g., Hewitt* v. *Helms*, 459 U.S. 460, 471-72 (1983); *Vitek* v. *Jones*, 445 U.S. at 489-90; *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. at 11-12. Where the language mandates a particular course of state action upon the existence of specified factual predicates, the individual interest created or protected thereby is an entitlement that is protected by the Due Process Clause. *Hewitt*, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); *Greenholtz*, 442 U.S. at 10 (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual").

When analyzed in this manner, the interest of the condemned in Florida in being spared from execution when incompetent is quite clearly a state-created entitlement. If the factual predicate of incompetency is demonstrated in Florida, state law *mandates* that the condemned person's execution be stayed during the period of incompetency. The present statute governing competency at the time of execution sets out this rule:

> (1) When the Governor is informed that a person under sentence of death may be insane, he *shall* stay execution of the sentence. . . .
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> * * * *
>
> (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on

> him, he *shall* have him committed to the state hospital for the insane.
>
> (4) When a person under sentence of death has been committed to the state hospital for the insane, he *shall* be kept there until the proper official of the hospital determines that he has been restored to sanity. . . .

Fla. Stat. §922.07 (emphasis supplied). Court decisions in Florida have followed the same rule for at least sixty years. *See, e.g., Ex parte Chesser*, 93 Fla. 590, 112 So. 87, 89 (1927) (when a person is condemned to die, "if, after judgment, he becomes of nonsane memory, execution shall be stayed"); *State ex rel. Deeb* v. *Fabisinski*, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933) ("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed"); *Hysler* v. *State*, 136 Fla. 563, 187 So. 261, 262 (1939) (if prisoner is "found to be insane an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated"); *Goode* v. *Wainwright*, 448 So.2d 999, 1001 (Fla. 1984) ("[w]e agree with [Goode's] contention that an insane person cannot be executed"). Florida has thus created an entitlement—not a "mere hope," *Greenholtz*, 442 U.S. at 11—that one will be spared from execution if incompetent.

Any argument that the interest in being spared from execution when incompetent is not a right thus has no support in Florida law. While the law in other states may permit the interest to be characterized as a "mere hope" that the governor will decide to exercise his or her "humane discretion" to spare the incompetent from execution, the law of Florida does not.[40]

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[40] In this context, it should be noted that the state-created interest under consideration in *Solesbee* v. *Balkcom*, *supra*, could properly have been analyzed as a mere hope for humane disposition. Significantly, Georgia's statute at that time—in contrast to Florida law—did not *require* the governor to have the condemned examined upon a showing of incompetency or even to stay the execution upon determining that the condemned was incompetent. Disposition was wholly within the discretion of the governor:

> Upon satisfactory evidence being offered to the Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor *may, within his discretion*, have said person examined by such expert physicians as the Governor may chose; . . . and

C. Florida's Statutory Competency-Determination Procedure Fails To Provide The Reliable Fact-Finding Procedure Required By The Fourteenth Amendment In The Administration Of The State-Created Right To Be Spared From Execution If Incompetent.

Once a state-created entitlement or substantive right is identified, the extent of procedural protection required by the Constitution must then be ascertained. *Morrissey* v. *Brewer*, 408 U.S. at 481. Since "[a] procedural rule that may satisfy due process in one context may not satisfy procedural due process in every case," *Bell* v. *Burson*, 402 U.S. at 540, in order to determine the procedural safeguards that are due, the Court has employed a balancing process that weighs three factors: the private interest that will be affected by the government action at issue, the public interest that will be affected if the safeguards are provided, and the probable effect such safeguards will have on reducing the risk of erroneous decisions. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 434; *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 17-18 (1978); *Dixon* v. *Love*, 431 U.S. 105, 112-15 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976). *See also Ake* v. *Oklahoma*, 105 S.Ct. at 1094.

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the Governor *may*, if he shall determine that the person convicted has become insane, *have the power* of committing him to Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force.

Solesbee v. *Balkcom*, 205 Ga. 122, 52 S.E.2d 433, 435 (1949) (quoting § 27-2602, *Georgia Code*) (emphasis supplied). In order to emphasize that the Due Process Clause did not apply to a Georgia inmate's interest in being spared from execution when incompetent, the Georgia Supreme Court contrasted that interest with the interest of a California inmate created by § 1367 of the California Penal Code, which provided that "'[a] person cannnot be . . . punished for a public offense, while he is insane.'" 52 S.E.2d at 437. Recognizing that this provision of California law (which is identical to Florida law) conferred "an absolute right . . . upon the condemned person," the Georgia court reasoned, "To protect this right the due-process clause of the Constitution may be invoked." *Id.* By contrast, the court concluded, "[T]he State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he has no such right. . . ." *Id.*

When applied in the context of determining competency at the time of execution, these factors require the state courts to provide the same procedural safeguards in enforcing the state-created right which they must provide if, in the context of the Eighth Amendment claim, their factfindings are to be sufficiently reliable to avoid the need for a federal evidentiary hearing: a full and fair evidentiary hearing, on the basis of which the factfinder reliably finds the relevant facts.[41] As we have already shown, Florida's present competency determination process provides none of the procedural safeguards demanded by this analysis.

The *private interest* that is affected by a state's determination of competency at the time of execution is obvious and compelling: the right of a condemned person to have a final opportunity to assert matters known only to him which would make his execution unlawful or unjust, as well as the right to appreciate the meaning of, and to prepare for, the termination of his life. Because this interest is concerned with the condemned person's very survival, it weighs heavily in favor of a reliable fact-finding procedure. *See Mathews* v. *Eldridge*, 424 U.S. at 340-43; *Goldberg* v. *Kelly*, 397 U.S. at 264. Just as compelling is the interest of the condemned in having his competency determined accurately, for only by accurate determination will the interests of the truly incompetent be protected. While the Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case," *Ake* v. *Oklahoma*, 105 S.Ct. at 1097, that interest clearly extends to the determination of competency at the time of execution.

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[41] The "minimum requirements of due process" underlying the concept of a full and fair evidentiary hearing are well known. *See Morrissey* v. *Brewer*, 408 U.S. at 488-89. *See also Vitek* v. *Jones*, 445 U.S. at 494-96; *Gagnon* v. *Scarpelli*, 411 U.S. at 786. To this list must now be added the right of an indigent to counsel for the reasons articulated in *Vitek* v. *Jones*, 445 U.S. at 496-97, and to the assistance of a competent psychiatrist. *Ake* v. *Oklahoma*, 105 S.Ct. at 1097. *See also Vitek* v. *Jones*, 445 U.S. at 497-500 (Powell, J., concurring).

The *public interest* has three aspects. The first two—the interest in reducing the cost of criminal proceedings and the interest in avoiding undue delay in executions occasioned by frivolous claims of incompetence—weigh against additional safeguards. The third—the interest in sparing the truly incompetent from execution—weighs in favor of additional safeguards. With respect to costs, Florida already pays three psychiatrists to evaluate the condemned. The additional cost occasioned by a hearing should not be burdensome, and in any event, "'does not justify denying a hearing meeting the ordinary standards of due process,'" *Goldberg* v. *Kelly*, 397 U.S. at 261. *See also Bell* v. *Burson*, 402 U.S. at 540-41. With respect to undue delay, the states can provide a procedure that is well-equipped to dispose quickly and efficiently of frivolous claims. *Cf.* Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts; Rules 12 and 56 of the Federal Rules of Civil Procedure. These or similar devices could be incorporated into state hearing procedures. Further, such procedures can adequately handle any "flood" of claims of incompetency, should there ever be one.[42] The courts have been trusted for hundreds of years to prevent delay due to the assertion of frivolous claims of incompetency because of their ability to distinguish "pretenses and realities." Hawles, *Remarks on the Trial of Mr. Charles Bateman* at 478.

The interest of the public that will be affected most significantly by the safeguards is the interest that the public *shares* with the condemned: the interest in accurate determinations of competency, to avoid executing the truly incompetent. *Cf. Ake*

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[42] The Court should take notice that there has not been—nor is there any sign that there will be in the future—a flood of frivolous claims of incompetence. Governor Graham has signed 122 death warrants in his seven years in office, and in only four cases have claims of execution incompetency been asserted. Further, during the time that Mr. Ford's case has had high visibility—between May 30, 1984 when his execution was stayed and the present—the claim of incompetency at execution has been raised in only two of the forty-two cases in which the Florida governor has signed death warrants. If there were any floodgates to open, *Ford* has provided a substantial opportunity for them to open, and they have not.

v. *Oklahoma*, 105 S.Ct. at 1094-95 ("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). When life and death are at issue, the Court's post-*Furman* jurisprudence recognizes that the public interest in reliability and accuracy is of paramount importance. *Id.* at 1097 ("[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed"). Accordingly, the public interest is very much in keeping with Justice Frankfurter's expression of it in his *Solesbee* dissent:

> It is a groundless fear to assume that it would obstruct the rigorous administration of criminal justice to allow the case to be put for a claim of insanity, however informal and expeditious the procedure for dealing with the claim. The time needed for such a fair procedure could not unreasonably delay the execution of the sentence unless in all fairness and with due respect for a basic principle in our law the execution should be delayed. The risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

339 U.S. at 25. *Accord Gardner* v. *Florida*, 430 U.S. at 360 ("the time invested in ascertaining the truth will surely be well spent if it makes the difference between life and death").[43]

Finally, as we have already shown, the *risk of error* inherent in the determination of legal/psychiatric issues is great unless the determination of such issues is entrusted to a full adversarial hearing. *See Ake* v. *Oklahoma*, 105 S.Ct. at 1096; *Bare-*

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[43] Notably, the public's interest in accurate competency determinations also *coincides* with its interest in avoiding delay. Under the present Florida procedure, it is as likely that a competent person will be found *in*competent as it is that an *in*competent person will be found competent. The procedure is simply an unreliable procedure for arriving at the truth. Accordingly, the public's interest in avoiding execution of the incompetent and in not delaying the execution of the competent can be best satisfied by a reliable fact-finding procedure.

foot v. *Estelle*, 463 U.S. at 899-903; *Vitek* v. *Jones*, 445 U.S. at 495. A full and fair evidentiary hearing is the only procedural mechanism that assures the accurate determination of the truth of a claim of incompetence. Unquestionably, the effect of such a safeguard is to reduce the risk of erroneous decisions.

Accordingly, the Fourteenth Amendment demands that the states determine competency, under a state-created right to be spared from execution if incompetent, on the basis of a full and fair evidentiary hearing. Florida's 922.07 procedure in no respect complies with this mandate of the Fourteenth Amendment.

CONCLUSION

For these reasons, petitioner respectfully requests that the Court vacate the judgment and opinion of the Court of Appeals, and remand Mr. Ford's case, with instructions that the District Court (1) conduct an evidentiary hearing to determine whether Mr. Ford is competent, in order to determine whether his execution is forbidden by the Eighth Amendment, and/or (2) grant the writ of habeas corpus unless the State of Florida provides for the determination of his competency through a procedure consistent with the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

[Section 922.07, *Florida Statutes* (1983), as amended (1985)]

922.07 Proceedings when person under sentence of death appears to be insane.—

(1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel the court that imposed the sentence shall appoint counsel to represent him.

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

(4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

(5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

History.—s. 268, ch. 19554, 1939; CGL 1940 Supp. 8663 (278); s. 134, ch. 70-339.

CHAPTER 85-193

Senate Bll No. 1185

An act relating to executions; amending s. 922.07, F.S.;

directing the Governor to have certain condemned persons committed to the Department of Corrections Mental Health Treatment Facility; directing the facility administrator to notify the Governor of certain findings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (3) and (4) of section 922.07, Florida Statutes, are amended to read:

922.07 Proceedings when person under sentence of death appears to be insane.—

(3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane.]

(4) When a person under sentence of death has been committed to a *Department of Corrections mental health treatment facility* [the state hospital for the insane,] he shall be kept there until the *facility administrator* [proper official of the hospital] determines that he has been restored to sanity. The *facility administrator* [hospital official] shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1985.

Filed in Office of Secretary of State June 18, 1985.

CODING: Words in [Bracket Type] are deletions from existing law; words in [Italicized Type] are additions.

APPENDIX B

STANDARDS OF COMPETENCY FOR EXECUTION

NATIONAL SURVEY OF STATE STATUTORY AND COMMON LAW

1. Explicit Statutory Proscription Against Execution Of The Incompetent

State/Statute	Competency Standard
ALABAMA Code § 15-16-23 (1982)	"insane"
ARIZONA Rev. Stat. Ann. §§ 13.4021 - .4024 (1978)	"insane"
ARKANSAS Stat. Ann. § 43-2622 (1977)	"insane"
CALIFORNIA Penal Code §§ 3700 - 3704.5 (1982)	"insane"
COLORADO Rev. Stat. (1978) §§ 16-8-110 et seq.	"incompetent to proceed"
CONNECTICUT Gen. Stat. Ann. § 54-101 (1983)	"insane"
FLORIDA Stat. (1981) § 922.07	"whether he understands the nature and effect of the death penalty and why it is to be imposed upon him"

State/Statute	Competency Standard
GEORGIA Code (1983) §§ 27-2601-2604	"insane." *See also* 1976 Op. Att'y Gen. Ga. 223 (execution competency test is "whether the individual is capable 'of presently understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the [proceedings] preferred against him demand'").
ILLINOIS Stat. Ann. ch. 38, ¶ 1005-2-3 (Smith-Hurd 1982)	"because of a mental condition he is unable to understand the nature and purpose of [the death] sentence." *See also People v. Geary*, 298 Ill. 236, 131 N.E. 652, 655 (1921) ("within the meaning of our statute, the defendant is [competent] when he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for originally, the purpose of his punishment, the impending fate which awaits him, and a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful, and sufficient intelligence to convey such information to his attorney or the court").
KANSAS Stat. § 22-4006 (Supp. 1981)	"sane or insane"

State/Statute	Competency Standard
KENTUCKY Rev. Stat. (1980) § 431.240(2)	"insane"
MARYLAND Crim. Law Code Ann. Art. 27, § 75(c) (Supp. 1985)	"insane"
MASSACHUSETTS Gen. Laws Ann. ch. 279, § 62 (1984 Supp.)	"insane"
MISSISSIPPI Code Ann. § 99-19-57 (Supp. 1985)	"insane" which is defined as "not hav[ing] sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorney or the court"
MISSOURI Rev. Stat. § 552.060 (1985 Supp.)	"as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out"
MONTANA Code Ann. § 46-19-201-221 (1983)	"lacks mental fitness"

State/Statute	Competency Standard
NEBRASKA Rev. Stat. § 29.2537-.2539 (1979)	"insane"
NEVADA Rev. Stat. §§ 176.425-.455 (1983)	"insane"
NEW MEXICO Stat. Ann. (1978) §§ 31-14-4 - 31-14-7 (1978)	"insane." *See also In re Smith*, 25 N.M. 48, 176 P. 819, 823 (1918) ("If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any facts which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be executed").
NEW YORK Correct. Law §§ 655-657 (McKinney 1984 Supp.)	"insane"
OHIO Rev. Code Ann. § 2949.28 - .30 (1979)	"insane." *See also In re Keaton*, 19 Ohio App. 2d 254, 250 N.E.2d 901, 906 (1969) (test under the statute is "'whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to

State/Statute	Competency Standard
Ohio	know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court'").
OKLAHOMA Stat. Ann. tit. 22, §§ 1004 - 1008 (Supp. 1985)	"insane." *See also Bingham* v. *State*, 82 Okla. Crim. 305, 310-11, 169 P.2d 311, 314-15 (1946) (test at common law was "a state of general insanity, the mental powers being wholly obliterated and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed"; court also cites with approval test articulated in *In re Smith*, 25 N.M. 48, *supra*).
SOUTH DAKOTA Codified Laws (1979) §§ 23A-27A-21	"mentally incompetent to proceed"
UTAH Code Ann. § 77-19-13 (1982)	"suffering from a mental disease or defect resulting either: (1) In his inability to comprehend the nature of the proceedings against him or the punishment specified for the offense charged; or (2) In his inability to assist his counsel in his defense." § 77-15-2.
WYOMING Stat. Ann. §§ 17-13-901-904 (1982)	"insane"

2. Judicial Adoption Of Common Law Rule Proscribing Execution Of The Incompetent:

State	Citation (Standard)
LOUISIANA	*State* v. *Allen*, 204 La. 513, 515, 15 So.2d 870, 871 (1943) ("insane").
PENNSYLVANIA	*Commonwealth* v. *Moon*, 383 Pa. 18, 117 A.2d 96, 102 (1955) (the "controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnosis mental illness . . . the determinative issue was whether that illness *so lessened* his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care") (emphasis in original).
TENNESSEE	*Jordan* v. *State*, 124 Tenn. 81, 135 S.W. 327 (1910) ("insane").
WASHINGTON	*State* v. *Davis*, 6 Wash.2d 696, 108 P.2d 641 (1940) ("insane").

3. General Statutory Procedures Requiring Transfer of Incompetent Prisoners to State Mental Hospital:

State/Statute	Competency Standard
DELAWARE Code Ann. tit. 11, § 406 (1979)	"mentally ill"
INDIANA Code. Ann. § 11-10-4-1 et seq. (West 1982)	"mentally ill and in need of care and treatment in the department of mental health or a mental health facility"

State/Statute	Competency Standard
NORTH CAROLINA Gen. Stat. § 15A-1001 (1983)	"by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner"
RHODE ISLAND Gen. Laws (1984) § 40.1-5.3-6 et seq.	"insane"
SOUTH CAROLINA Code § 44-23-220 (1985)	"mentally ill or mentally retarded"
VIRGINIA Code § 19.2-177 (1983)	"insane or feebleminded"

4. States Which Have Recently Repealed Statutes, Leaving Case Law Which Supports The Common Law Rule:

State	Citation (Standard)
NEW JERSEY	*In re Lang*, 77 N.J.L. 207, 71 A. 47, 48 (1908) (if prisoner is "capable of understanding the nature and object of the proceedings against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is . . . deemed to be sane, although on some other subjects his mind may be deranged or unsound").
TEXAS	*Ex parte Morris*, 96 Tex. Crim. 256, 257 S.W. 894 (1924) ("insane").

NOTE:

Nine states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia, and Wisconsin) have no death penalty.

Two states (Idaho and New Hampshire) have a death penalty but no law relating to competency for execution.

Two states (Oregon and Vermont) were undetermined.

SUMMARY: OVERALL CATEGORIES

Explicit statutory proscription	25
Judicial adoption of common law	4
Statutory procedure applying to "any" prisoner	6
No case law or statute (but yes a death penalty)	2
Repealed statutes, leaving common law	2
No death penalty	9
Undetermined	2
	50

METHOD OF STUDY: This survey includes an examination of statutory and case law in each of the fifty states from 1895-present.